their eyes to the fact that Malaya is one of those countries which apply different rules of law to different classes of subjects according to their races and creeds so that it is necessary to find to which of these a person belongs before the particular rule applicable to his case can be known. Thus, the only "law of the land" is that the personal law depends upon the community; to determine the actual rule is a matter of evidence.

Although the judgment in *Laton's* case was reported more than twenty-five years ago I cannot find any case where it was followed, or even cited. There are, however, several later cases where it was not followed. For instance, in *Woon Ngee Yew v. Ng Yoon Thai*[2] the Court of Appeal treated Chinese family law as a matter of evidence. In principle, there is no possible distinction, for this purpose, between Chinese customary law and Mohammedan or Hindu law; all are of foreign origin and each forms part of the personal law of a local community.

What is sometimes called "pure Mohammedan law" does not recognise adoption in the sense of this case but the relevant law of these States is not pure Mohammedan law; the treaties call it "Mohammedan law as varied by Malay custom"; historically, that is put the wrong way round; the personal law of the peninsular Malays is composite; it is ancient Malay custom modified or supplemented by subsequent adoption of part of the Mohammedan law; the extent to which the Moslem law has superseded the customary law varies from place to place but no where has the customary law wholly disappeared.

In *Muhammad Ismail Khan v. Lala Sheomukh Rai*[3] a case very like *Laton v. Ramah, supra,* the Privy Council expressly ordered evidence to be admitted to prove a customary rule of inheritance at variance with Mohammedan law.

For all these reasons I am clearly of opinion that the decision of the Court of Appeal in *Laton v. Ramah* is not a valid authority. It is in direct conflict with an earlier decision of the Privy Council and also with later decisions of the same Court. It stands alone; it has often been disregarded, consciously or unconsciously, and it cannot be followed.

The evidence being admissible, and part of it having been accepted, I find that the practice of adoption exists among the Malays of central Pahang and I recognise it as part of their personal law.

Whether an unmarried person can adopt a child is a question which does not arise here and must be left open; I would remark in passing that I can see no reason why an elderly woman should not adopt a girl or young woman, as often happens in other places. Where, however, as in this case, a young infant is adopted by a married couple the adoption must, in the nature of things, be by the couple jointly; it is not revoked by the death of the adoptive father, if the adoptive mother survives.

Whether it is revocable in any circumstances is another open question. I only decide here that if it is revocable, the right to revoke is vested in the natural parents; the child's grandfather cannot intervene to revoke it over their heads.

The plaintiff therefore succeeded on the main issue but custody is always a matter for discretion which must be exercised in the interests of the child. At the time of the trial the plaintiff was living in a houseboat which was probably not a very good home for a girl of twevle, (though the attack made on the plaintiff by the grandfather was almost certainly exaggerated). I therefore gave the adoptive mother the custody subject to the condition that she carried out her avowed intention of going to live with her own family in Trengganu.

On the question how such a decree should be enforced, the learned Assistant Registrar at Raub, Che Ismail, pointed out that several difficulties might arise; he sugguested that the actual transfer of custody might be arranged by the Penghulu of the mukim. I entirely approved the idea of trying informal methods first and the Registrar accordingly sent a sealed copy of the decree to the Penghulu, with an official letter requesting him to carry it into effect. Within a few days the Penghulu not only effected the transfer of the physical custody of the child but also settled a monetary dispute between the parties which would otherwise have been the subject of troublesome proceedings.

Order accordingly.

LEONG HOI KOW v. CHAN HO YAT.

[App. Civ. Juris. (Thomson, J.) March 13, 1951]

[Ipoh — Civil Appeal No. 30 of 1950]

Landlord and Tenant — Control of Rent Ordinance, No. 6 of 1948 — Possession — Non-payment of rent — waiver of part irregularities in payment — Rent in arrears for fourteen days or upwards.

The appellant in this case was the landlord of premises known as No. 68 Treacher Street, Ipoh. The respondent became the tenant of the premises sometime in 1941 and was at the commencement of this case in occupation of same. The appellant sued for ejectment of the respondent from the premises and other relief on the ground that the respondent's tenancy had been terminated by notice dated 15th June, 1950, with effect from 1st

August, 1950, and that on 15th June, 1950, the respondent was more than fourteen days in arrears with his rent. The respondent admitted that his tenancy had been terminated as at 1st August, 1950, but he denied that he had been at any material time in arrears with his rent and was therefore entitled to the protection of the Control of Rent Ordinance. It was admitted that the notice to quit was served on the respondent on 15th June, 1950, and it was also admitted that up to and including that date rents for the months of May and June 1950, had neither been paid nor tendered. The question, therefore, for the decision of the Court was whether or not on that date rent was in arrears for at least fourteen days.

The appellant's evidence was that rent was payable monthly in advance and although he admitted that, at least since 1946, it had been paid very irregularly he denied that there had been any modification of the original arrangement. The respondent's mother-in-law, on the other hand, who seemed to have acted throughout his agent in relation to the tenancy, said that she entered into an agreement with the appellant sometime in 1946 under which rent was to be paid once in two months. She was silent as to whether it was to be payable in advance or in arrears. The appellant's evidence that the original agreement as to payment of rent was that it should be payable monthly in advance was not contradicted.

Held, (1) that when a tenancy has been legally determined by notice to quit, the tenant is not entitled to the protection of the Control of Rent Ordinance if at the date of the service upon him of the notice terminating the tenancy the rent was in arrears for fourteen days or upwards; (2) that if the agreement as to payment of rent was modified by some new agreement, the onus of proving that the new agreement lay upon the party setting it up, that is to say, upon the respondent. Appeal allowed.

Cases referred to :—

(1) *Low Bee Hoe v. Morsalim* (1947) M.L.J. 3; (1946) S.L.R. 62.
(2) *Wagner v. Tan Eng Yeow* (1947) M.L.J. 33; (1946) M.U.L.R. 57.
(3) *Luang Bhasa Bheraj v. Tan Kim Lean* (1948) M.L.J. 78.
(4) *Panoutsos v. Raymond Hadley Corporation of New York* (1917) 1 K.B. 767.*
(5) *Tankexpress A/S v. Compagnie Financiere Belge Des Petroles S.A.* (1949) A.C. 76.
(6) *Bird v. Hildage* (1947) 2 All E.R. 7.
(7) *Cape Asbestos Co. v. Lloyds Bank, Ltd.* (1921) W.N. 274.
(8) *In re Tyrer & Co.* 6 Com. Cas. 143.
(9) *Bentsen v. Taylor, Sons & Co.* (1893) 2 Q.B. 283.

CIVIL APPEAL from a decision of the Magistrate at Ipoh dismissing the landlord's claim for possession.

H. T. Ong for the appellant.

S. N. Veerasamy for the respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Thomson, J. : — This is an appeal from a decision of the Magistrate at Ipoh.

The appellant is the landlord of premises at 68 Treacher Street, Ipoh. The respondent became the tenant of the premises some time in 1942 and is still in occupation of them. The appellant sued for ejectment of the respondent from the premises and other relief on the ground that the respondent's tenancy had been terminated by notice dated 15th June, 1950, with effect from 1st August, 1950, and that on 15th June, 1950, the respondent was more than 14 days in arrears with his rent. The respondent admitted that his tenancy had been terminated as at 1st August, 1950, but he denied that he had been at any material time in arrears with his rent and so said he was entitled to the protection of the Control of Rent Ordinance. The Magistrate dismissed the suit and against that decision the appellant has now appealed.

I shall deal with the facts of the case at a later stage. It will, however, be useful if at this stage I make certain observations as to the legal position.

It is frequently overlooked that in cases of this nature where ejectment is sought the Court has to consider two distinct questions. It has to consider in the first place whether by reason of the agreement between the parties by virtue of which the tenant has come into possession there is or is not a subsisting tenancy. If there is, that is an end of the matter and the landlord is not entitled to ejectment. If there is not, the question then arises whether the tenant is entitled to remain in possession by virtue of the Control of Rent Ordinance, 1948.

The Rent and Charged Land (Restriction) Enactment, 1940, which was repealed by the 1948 Ordinance, in effect restricted the landlord's rights to terminate his tenant's contractual tenancy for by section 7 it provided that except in certain specified cases no landlord could "take any step towards ejecting his tenant." That provision, however, does not appear in the 1948 Ordinance and therefore a landlord is free to terminate any contractual tenancy by notice or otherwise in accordance with the terms of the tenancy agreement. In the present case it is admitted that that was done (see paragraph 5 of Plaint and paragraph 4 of the Defence) and therefore the only question before the Magistrate was whether or not the tenant was entitled to the protection of the Control of Rent Ordinance.

The portions of that Ordinance which are relevant to the present case read as follows :—

"12. No landlord shall, without the permission of the Board in writing, eject or apply to any Court for an order for the ejectment of his tenant from any premises:

Provided that this section shall not apply to ejectment for non-payment of rent where rent at a lawful rate has been in arrears for fourteen days.

13. No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —

* The decision of Bailhache, J. in this case was confirmed in (1947) 2 K.B. 473. Ed. M.L.J.

(a) where, at the date of the service of the notice determining the tenancy given by the landlord, rent lawfully due was in arrear for fourteen days or upwards."

Here the permission of the Rent Board to seek ejectment was not obtained. Therefore the only question that arises is whether at the material date the rent was in arrear for fourteen days or upwards.

As to what is the material date for the purposes of the Ordinance, I do not think that any useful purpose is to be served by considering the decisions of the Court on previous legislation on the same subject in Singapore or in the Malayan Union. In the case of *Low Bee Hoe v. Morsalim*[1], Worley, J., held that for the purposes of section 8 of Singapore Ordinance No. 35 of 1939 as amended by Ordinance No. 30 of 1941 the material date was the date of commencement of ejectment proceedings. In *Wagner v. Tan Eng Yeow*[2], Willan, C.J., held that for the purposes of section 7 of F.M.S. Enactment No. 14 of 1940 the material date was the date of the notice to quit. The question was also discussed by Carey, J., in *Luang Bhasa Bheraj v. Tan Kim Lean*[3]. I do not find it necessary to discuss these decisions beyond saying that they are based on statutory provisions materially different from those contained in the 1948 Ordinance. Nor is it necessary to refer to the English decisions on the point for again there are material differences between the provisions of the 1948 Ordinance which have been quoted and the corresponding provisions of the English Acts.

The proviso to section 12 of the 1948 Ordinance is in extremely wide terms. It says in effect that permission from the Rent Board to apply for ejectment is not necessary where rent "has been" in arrears for fourteen days, and it is particularly to be noted that the expression used is "has been" and not "is" as in section 8 of Singapore Ordinance No. 35 of 1939 as amended by No. 30 of 1941. If that provision stood alone, it might enable the landlord to come to the Court without the permission of the Board where rent had at any time been in arrears for fourteen days. It is, however, restricted by the immediately following provision of section 13 that no order for possession can be made except where at the date of the service of the notice determining the tenancy rent was in arrears for fourteen days or upwards. So far as I have been able to advise myself, there is in existence no binding authority on the point and I have no hesitation in giving the provisions quoted what seems to be their clear and ordinary meaning that when a tenancy has been legally determined by notice to quit the tenant is not entitled to the protection of the Ordinance if at the date of the service upon him of the notice terminating the tenancy the rent was in arrears for fourteen days or upwards.

In the present case it is admitted that the notice to quit was served on the tenant on 15th June, 1950, and it is admitted that up to and including that date rent for the months of May and June, 1950, had neither been paid nor tendered. The question, therefore, which the Magistrate had to decide was whether or not on that date rent was in arrears for at least fourteen days.

The answer to that question depends on the terms of the tenancy agreement (which was not in writing) as to the payment of rent. The plaintiff's evidence was that rent was payable monthly in advance and although he admitted that, at least since 1946, it had been paid very irregularly he denied that there had been any modification of the original arrangement. The defendant's mother-in-law, on the other hand, who seems to have acted throughout as his agent in relation to the tenancy, says that she entered into an arrangement with the plaintiff sometime in 1946 under which rent was to be paid once in two months. She was silent as to whether it was to be payable in advance or in arrear but receipts were produced covering the rent from July, 1946, to April, 1950, both months inclusive, which it was argued went to show that if there was an agreement to modify the terms of payment it was to the effect that rent should be payable not only bi-monthly but also in arrear. In his grounds of judgment the Magistrate said :—

"Examination of the receipts.....revealed that they were all for 2 months' rent each and that payments thereof were irregular and certainly never in advance."

That statement is not wholly accurate. The first receipt produced is dated 9th August, 1946, and is for the July and August rent, that is to say, at the beginning of August rent was paid for July in arrear and for August in advance. Similarly, at the beginning of October, at the beginning of December and at the beginning of February payments were made in each case of two months rent, the preceding month in arrear and the current month in advance. Then comes a gap of three, not two, months, and at the beginning of May, 1947, rent is paid for April and March in arrear. Thereafter, until May, 1950, rent is paid for every month up till and including April, 1950, in sums equal to two months rent at a time at periods varying from two to thiry-seven days after the conclusion of the second month in respect of the rent for which the payment in question was made. The Magistrate dealt with the matter as follows :—

"There was therefore abundant evidence before me on which it was possible for me to infer that agreement or no agreement, plaintiff had waived all objections to

the form of payment made by defendant viz. 2 months' rent at a time and paid not in advance but in arrear", and on that he concluded that on 15th June, 1950, there was no rent in arrear.

The appellant's evidence that the original agreement as to payment of rent was that it should be payable monthly in advance was not contradicted, and if that agreement as to payment of rent was modified by some new agreement in 1946, the onus of proving that new agreement lay upon the party setting it up, that is to say, upon the respondent. The Magistrate has failed to state any finding on the point one way or the other and that in itself is on the face of it a decision against the respondent on the point. In case, however, his failure to state such a finding be due to inadvertence, I feel I should point out that if as seems probable some sort of agreement was come to in 1946 to pay rent bi-monthly instead of monthly the defendant's mother-in-law was the only witness who speaks to it. She, however, is silent as to whether payment was to be in advance or in arrears and the receipts definitely suggest that if there was any such agreement it was to pay partly in arrear and partly in advance, that is to say, that each bi-monthly payment was to be in respect of the preceding month and of the current month. It is conceivable that that agreement may have been followed by another agreement in 1947 but no witness has said it was and it is at least equally possible that there was a month's delay in making the payment which should, on the hypothetical 1946 agreement, have been made at the beginning of April, 1947, and that that month's delay was never caught up with.

If there was any agreement between the parties modifying the original tenancy agreement or modifying any modification of that agreement that was arrived at in 1946 to the effect that not only was rent to be paid bi-monthly but also that it was to be paid at some time subsequent to the end of each period of two months to which it related that would, of course, be an end of the matter. As I have said, however, there is no evidence of any such agreement and from the conduct of the parties in so far as it appears from the receipts it would be very difficult to say what the terms of any such agreement were for the receipts show that from May, 1947, onwards payments were actually made at periods following from two to thirty-seven days after the conclusion of the periods to which they related. To my mind, the evidence, such as it is, is much more consistent with a long course of toleration of breaches either of the original agreement or of the hypothetical 1946 agreement by a slack and indulgent landlord rather than with any willing acceptance of payment either wholly or partly in arrear as a method of performance of his obligations under the contract by the tenant.

That, however, is not the end of the matter for even on that basis it was argued by Mr. Veerasamy for the respondent, basing himself on the cases of *Panoutsos v. Raymond Hadley Corporation of New York*[4] and *Tankexpress A/S v. Compagnie Financiere Belge Des Petroles S.A.*[5], that the appellant having tolerated such a course of conduct on the part of respondent was not entitled to turn round without any previous notice and take advantage of it.

The answer to this argument so far as it rests on *Panoutsos'*[4] case is to be found in the judgment of the Court of Appeal in *Bird v. Hildage*[6] where for all practical purposes the facts were on all fours with those in the present case. The judgment of the Court was delivered by Cohen, L.J. He referred to the *Panoutsos'*[4] case and quoted the observations of Bailhache, J., in *Cape Asbestos Co. v. Lloyds Bank, Ltd.*[7] to the effect that the *Panoutsos*[4] case had only reference to an act which had to be done once and for all, and not to an act which had to be done periodically.

His Lordship went on to say:—

"In the present case, the quarterly instalments of rent are plainly periodical acts and we respectfully agree with the observations made by Bailhache, J., in the passage last cited. Indeed it would be most unfortunate if, in such a case, mere forbearance by a landlord to exercise his rights of distress or re-entry, on one or more occasions was held to bind him for the future, since landlords would then tend to be more harsh in the enforcement of their legal rights. There may, no doubt, be cases where the court can properly infer from the conduct of the parties a variation of the original agreement. Lynskey, J., gave an illustration of such a case in the course of the argument, when he put to counsel the case where the tenancy agreement provided for the payment of weekly rent on a Monday, but for the convenience of the landlord the rent was always collected on a Wednesday. We can find here no evidence of any such variation of the contract, and, in our opinion, the reasons given by the judge do not justify the conclusion which he reached.

There is, moreover, this further reason for our conclusion. We are concerned in this case, not with the question whether, by reason of a breach by the tenant of one of his obligations, the landlord can determine the contract of tenancy, but with the question whether, by the terms of the statute, the court has jurisdiction to entertain the suit. Parliament has provided that such jurisdiction arises if "any rent lawfully due from the tenant has not been paid." Even, if as a result of his forbearance, a landlord were disabled from terminating a contractual tenancy without first giving notice of an intention so to do, it by no means follows that such forbearance ousts the jurisdiction of the court. As a matter of construction of the statute, unless the circumstance amounted to a variation of the terms of the tenancy or (as counsel for the tenant concedes they would not) estopped the landlord from averring that any rent was, in fact, due or unpaid, it is, in our opinion, impossible to say that the conditions of the statute are not satisfied."

The passage which has just been quoted would appear to be conclusive. Mr. Veerasamy, however, argued that it should not be relied upon because it proceeded on a view of *Panoutsos'*[4] case which

differed from certain views expressed regarding that case by Lord Wright in the course of his speech in the House of Lords in the *Tankexpress*[5] case which I shall quote at a later stage.

Panoutsos'[4] case was not formally considered by the House of Lords in the *Tankexpress*[5] case and in order to appreciate the observations of Lord Wright on which Mr. Veerasamy relies it is necessary to set out the course of the *Tankexpress*[5] case in some detail.

The material facts of the case as they appear from the headnote are that by a charterparty made in 1937, the owners of a vessel, a Norwegian company, let it to charterers, a Belgian company, for seven years on terms *inter alia* that payment of the hire should be "in cash, monthly, in advance, in London" and that "in default of such payment the owners shall have the faculty of withdrawing the said vessel from the service of the charterers". The hire was normally due on the twenty-seventh of each month, and despite the express terms, the accepted method of payment between the parties was for the charterers to send a cheque in favour of a London Bank to be placed to the credit of the owners with an Oslo bank, and the hire was regularly paid in that way during the currency of the charter. Owing to delay occasioned by the war the cheque for the hire due on 27th September, 1939, was not delivered until 3rd October, and on 30th September, 1939, the owners on the ground of non-payment of the hire purported to cancel the charterparty and withdrew the vessel from the service of the charterers. The matter went in the first place to arbitration and the arbitrator found, *inter alia,* that the hire normally became due on the twenty-seventh day of each month, that the accepted method between the parties with regard to the payment of hire had been that which has been described and that until the payment of hire due on 27th September, 1939, "the payment of hire had been regularly and properly paid in this way". In the event, it was held by the House of Lords that the charterers having paid in the accepted way were not in default and that though the owners could at any time have insisted on strict performance thereafter of the contract they were not entitled to vary the accepted method of performance without due notice to enable the charterers to perform the contract in the manner demanded.

The real basis of that decision was that there was a *lacuna* in the terms of the written contract which for the effective working of the contract had to be filled in, and that the parties had adopted and accepted a method of filling it in. In other words, there was an ancillary agreement between the parties which, *pro tanto* was binding on them. The contract required payment "in cash . . . in London". It was, however, silent as to what was meant by cash — coin, currency or transfer of credit. Moreover, the shipowners were in Norway, the charterers were in Belgium and payment was to be made in London. "The situation of the parties", said Lord Wright, (at p. 95) "required some definition of what constituted payment beyond the bare usual and conventional words of clause 11 of the charterparty". "In these circumstances", said Lord Porter (at p. 93), "the true inference to be drawn is that the method of performance of the contract was varied by an arrangement for payment to Hambro's Bank by cheque posted at such time as would in the ordinary course of post reach London on the twenty-seventh of the month . . . No doubt the appellants could at any time have insisted upon a strict performance of the contract after due notice, but they were not, in my view entitled suddenly to vary the accepted method of performance without first notifying the respondents in time to enable them to perform the contract in strict conformity with the terms of the charterparty."

Lord Uthwatt dealt the with matter thus (at p. 100) :—

> But for the parties coming to some working arrangement, the charterers — a Belgian corporation — with cash in hand, would have had to search for the shipowners — a foreign corporation — in London and, inasmuch as a corporation can act only through agents, pay the cash to some agent of the shipowners in London duly authorised to receive the cash, it being the duty of the shipowners to provide and duly notify the charterers some person duly authorised to receive payment on their behalf. Some arrangement was obviously necessary in the interests of the shipowners as well as the charterers. The "accepted method" specified by the arbitrator contains the arrangement and it is indeed a sensible arrangement from the point of view of both parties. So long as the arrangement stood, it represented an agreed method of working out the obligation as to payment imposed by the charterparty, as distinct from an agreement to vary its terms. So long as it stood, the shipowners could not demand, nor the charterers insist on making, payment otherwise than in accordance with the terms of the arrangement."

Lord du Parcq treated the matter more exclusively on the basis that there had in fact been an ancillary agreement as to the method of payment but he distinguished the case sharply from one where payment of hire was paid after the prescribed time (p. 102). He referred to the finding of the arbitrator that as regards payment there had been "an accepted method between the parties" and he went on to say that these words "cannot be explained away as a mere equivalent to some such phrase as 'the method which the charterers had in fact adopted without objection on the part of the owners'. They must surely mean that the owners had not only acquiesced in the method, but approved its continuance at least until they chose to notify the charterers that they withdrew their acceptance."

The case was thus decided without reference to *Panoutsos'*[4] case which was not mentioned by Counsel in argument or, except on one occasion, by their Lordships in their speeches. In parenthesis I would observe that *Bird v. Hildage*[6] was not mentioned at all.

Lord Wright, however, after having dealt with the matter on the lines I have described went on to say :—

"But there was a further and alternative way of looking at the position which would require the same answer to the question propounded in the special case."

He referred to the contention that the shipowners having accepted what the arbitrator had found to be the accepted way of paying cash in London could not suddenly without reasonable notice insist that the respondents should have adopted a different method of paying the hire, and said that he thought this contention was sound on the principle laid down in *Panoutsos'*[4] case in the following words of Viscount Reading, C.J. :—

"I cannot find any authority to support the proposition that, when one party has led another to believe that he may continue in a certain course of conduct without any risk of the contract being cancelled, the first-mentioned party can cancel the contract without giving any notice to the other so as to enable the latter to comply with the requirement of the contract."

Lord Wright went on to say :—

"The present is a fortiori a case for the application of this principle, which is that of fair dealing and justice."

On this portion of Lord Wright's speech I do not think it is safe to say more than that His Lordship considered certain observations made by Viscount Reading in the course of his judgment in *Panoutsos'*[4] case as expressing what His Lordship himself regarded as a possible view of the case before him. To regard it as in a way extending the scope of the decision in *Panoutsos'*[4] case as a whole would not only be to disregard the reasoning of Cohen, L.J., in *Bird v. Hildage*[6], but would also necessarily imply that Lord Wright had disregarded the portions of Viscount Reading's judgment immediately preceding and immediately following the words he quoted. In *Panoutsos'*[4] case a seller of goods had contracted to deliver against a confirmed credit to be opened by the purchasers. The purchasers opened a credit which, however, was not confirmed and was therefore in breach of the contract. In spite of that breach the sellers made several deliveries but at a later stage they claimed to cease deliveries and to cancel the contract without notice on the ground of that breach. In the course of his judgment Viscount Reading referred to the case of *In re Tyrer & Co.*[8] which, he said, showed that "where there are stipulated times in a charterparty for payment of the hire of a ship and a power to withdraw the ship if payment is not made at a stipulated time, the mere fact that there has been default in payment at one or more stipulated times, of which advantage has not been taken, does not entitle the party in default at a subsequent time to a notice so as to enable him to comply with the condition before the right to withdraw arises". He went on to say "that is a totally different case from the present." Then he made the observations quoted by Lord Wright and followed them by referring to the case of *Bentsen v. Taylor, Sons & Co.*[9] which was a case where a party to a contract had failed to repudiate immediately on the breach of a condition precedent by the other party but had unsuccessfully attempted to take advantage of it after conduct which amounted to a waiver of such right.

With the greatest respect, I would express the view that the decisions in *Panoutsos'*[4] and *Tankexpress*[5] are only of value as illustrating the application of what Lord Wright described as the principle of fair dealing and justice to certain sets of circumstances. The argument in the present case has turned too much on words and too little on reality. There is all the difference in the world between refraining from physically receiving a payment which is tendered otherwise than in accordance with the terms of a contract and accepting what has been done as a method of performance. It rests on the distinction between acquiescence and approval drawn by Lord du Parcq in the *Tankexpress*[5] case. Acquiescence may or may not support the inference of approval or acceptance in the sense of receiving with a consenting mind and whether or not that inference should be drawn is to be decided in the circumstances of each individual case. I have not, however, been referred to nor have I been able to discover any authority for saying that such an inference should or can be drawn when there is nothing more than a course of irregular payments which have nothing in common except the fact that they are late by periods of time differing in every instance.

In any event, this is not a case where the landlord is seeking to take advantage of any breach of the terms of the contract by the tenant to put an end to the contractual tenancy, for that tenancy had been ended by notice prior to the commencement of the ejectment proceedings. What I am concerned with is the question of whether the tenant is entitled to the protection of the Control of Rent Ordinance. On that question I adopt with respect the relevant portion of Cohen, L.J's judgment in the passage I have already quoted from *Bird v. Hildage*[6], and in view of what I have said as to the facts of the case I am bound to hold that the tenant is not entitled to such protection.

The appeal is therefore allowed with costs.

Appeal allowed.